Federal Communications Commission
Washington, D.C.

DOCKET FILE COPY ORIGINAL

March 6, 2000

Competition Policy Institute
c/o Debra Berlyn, Executive Director
1156 15th St. NW Suite 520
Washington, D.C. 20005

Re: Acceptance of Comments As Timely Filed in (Docket No. 98-184)

The Office of the Secretary has received your request for acceptance of your pleading in the above-referenced proceeding as timely filed due to operational problems with the Electronic Comment Filing System (ECFS). Pursuant to 47 C.F.R. Section 0.231(I), the Secretary has reviewed your request and verified your assertions. After considering arguments, the Secretary has determined that this pleading will be accepted as timely filed. If we can be of further assistance, please contact our office.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas WTC
Secretary

CPI
Competition Policy Institute



February 23, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., N.W.
Washington, D.C. 20554

**Re: CC Docket No. 98-184, In The Matter Of GTE Corporation, Transferor, And Bell Atlantic Corporation, Transferee, For Consent To Transfer Of Control**

Dear Ms. Salas:

The Competition Policy Institute, ("CPI") respectfully requests leave to file the attached Reply Comments of CPI in the above-referenced proceeding one business day out of time. On the official filing date, February 22, 2000, CPI experienced unforeseen difficulties uploading Comments to the Commission's Electronic Comment Filing System ("ECFS"), rendering it impossible to file and serve a full and complete copy of the Comments in accordance with the Commission's rules. According to the ECFS help desk, the web server for the ECFS system has been experiencing difficulties over the past several days apparently causing CPI's inability to file timely comments. Because CPI will file the complete set of Reply Comments less than one business day after the pleadings were due, CPI submits that no interested party will be prejudiced by the late filing. For the foregoing reasons, CPI respectfully requests that the Commission accept CPI's Reply Comments as timely.

Respectfully submitted,

Debra Berlyn

Debra Berlyn, Executive Director
Competition Policy Institute
1156 15th St. NW Suite 520
Washington, D.C. 20005

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| BELL ATLANTIC CORPORATION, | ) | |
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| Transferee, | ) | |
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| For Consent to Transfer of Control | ) | |

# REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

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February 22, 2000

## SUMMARY

Bell Atlantic and GTE cannot lawfully merge so long as GTE provides interLATA operations in those Bell Atlantic in-region states for which section 271 applications have not been granted. Nonetheless, Bell Atlantic and GTE have proposed to permit the interLATA operations of GTE-Internetworking to continue, post merger, in Bell Atlantic's in-region states, without obtaining authority under section 271. This plainly violates the Communications Act.

Section 271 occupies a specially protected place in the statutory framework crafted by Congress. It plays a unique role in creating the incentives for the Bell companies to meet their market-opening requirements and thereby enable consumers to enjoy the benefits of competition. It is one of only two provisions as to which the Congress denied the Commission forbearance authority. The Commission has an obligation to ensure strict compliance with section 271, in the context of merger reviews, and otherwise.

Under the parties' current proposal to circumvent section 271, GTE would transfer its interLATA Internet backbone operations to a new company ("DataCo"). But BA/GTE would retain equity interests and control sufficient to make DataCo an "affiliate" and therefore subject to section 271. Accordingly, unless the parties are prepared to agree to full divestiture of GTE's interLATA operations, as a precondition of merger approval, there is no reason for the Commission to consider the merger further.

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# REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

The Competition Policy Institute ("CPI") hereby replies to the comments submitted in response to the Supplemental Filing of Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE").[1] Bell Atlantic and GTE seek to circumvent an express statutory prohibition that the Commission has no power to waive. As the initial comments of multiple other parties have demonstrated, the Commission cannot countenance such a deviation from the provisions of the Communications Act.

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[1] GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control, CC Docket No. 98-184, Supplemental Filing of Bell Atlantic and GTE (filed January 27, 2000) ("Supplemental Filing").

## I. INTRODUCTION

As the Commission is aware, the Competition Policy Institute is a non-profit organization that advocates state and federal policies to bring competition to telecommunications and energy markets in ways that benefit consumers. When Bell Atlantic and GTE first filed their request for FCC approval of their proposed merger, CPI filed detailed reply comments in opposition.[2] Overall, CPI believed that the merger would be damaging to competition and to consumers. More specifically, CPI articulated four main concerns:

- That the merger would eliminate a significant potential competitor in both the Bell Atlantic and GTE regions (CPI 1998 Comments at 6-8);
- That the merger would strengthen the two companies' incentives and ability to thwart the growth of local competition (CPI 1998 Comments at 8-12);
- That the merger would reduce the number of large incumbent local exchange carriers whose performance could be used to "benchmark," or compare, one company against another (CPI 1998 Comments at 12-14); and
- That the merger would increase the opportunity for the merged company to leverage its market power into other markets (CPI 1998 Comments at 14-17).

For all these reasons, CPI urged the Commission to deny the application for consent to transfer of control.

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2 GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control, CC Docket No. 98-184, Reply Comments of the Competition Policy Institute (filed December 23, 1998)("CPI 1998 Comments").

All of the concerns CPI previously raised remain valid today. All of them still constitute reasons why the Commission cannot properly determine that the proposed merger serves the public interest, convenience, and necessity. See 47 U.S.C. §§ 214(a), 310(d).

These issues, however, may be moot. As is clear from the Supplemental Filing of Bell Atlantic and GTE, the parties apparently remain determined to retain an impermissible interest in an entity that provides interLATA services. This would violate section 271(a). So long as the parties remain unwilling to divest fully and immediately the existing interLATA operations of GTE Internetworking ("GTE-I") in those of Bell Atlantic's "in-region" states for which section 271 approval has not been obtained, there is no reason to conduct a public interest assessment, for the merger cannot lawfully be approved.

## II. PROPOSED TERMS OF THE BA/GTE MERGER ARE UNLAWFUL UNDER SECTION 271 OF THE 1996 ACT.

Under section 271 of the Communications Act, 47 U.S.C. § 271, no Bell operating company ("BOC" or "Bell company") *or affiliate* may provide in-region interLATA service, unless the Commission determines that the BOC has complied with the requirements of section 271.[3] This proscription applies to all interLATA activities, including Internet backbone services, point-to-point private lines, and traditional long distance service. As the parties to the proposed

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[3] The Commission may grant a BOC authorization to originate in-region, interLATA services only if it finds that the BOC has met the competitive checklist set forth in section 271(c)(2)(B) and other statutory requirements. 47 U.S.C. § 271(d)(3). Unless and until authorization is granted, the prohibition against BOC provision of in-region, interLATA service applies not only to a BOC but also to its affiliates. 47 U.S.C. § 271(a). An affiliate is defined as "a person that (directly or indirectly) owns or controls, or is under common ownership or control with, another person. [The] term 'own' means to own an equity interest (or equivalent thereof) of more than 10 percent." 47 U.S.C. § 153(1).

merger apparently admit,[4] the prohibition on the provision of interLATA services would apply with full force to a company formed by the merger of Bell Atlantic and GTE (this hypothetical entity will be referred to herein as "BA/GTE"), just as it now does to Bell Atlantic alone. Thus, under section 271, Bell Atlantic and GTE cannot lawfully merge so long as GTE provides interLATA services in those Bell Atlantic in-region states for which section 271 applications have not been granted.

### A. Bell Atlantic And GTE Have Floated A Number Of Different Proposals Designed To Avoid The Application Of Section 271.

The parties to this proposed merger have taken a variety of different approaches to the interLATA issues raised by their proposed combination. When the merger application was first filed, Bell Atlantic and GTE virtually ignored section 271.[5] Later, apparently recognizing the seriousness of section 271 as an obstacle to their plans, the parties proposed in essence to abolish the notion of LATAs for purposes of data traffic.[6] Next, they refined this proposal by proposing the creation of a single LATA for GTE-I existing interLATA businesses, to take effect once Bell Atlantic secured section 271 authority for 25 percent of its lines.[7] Then, the parties sought to

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4 See Supplemental Filing at 35-36.

5 GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control, CC Docket No. 98-184, Application for Consent to Transfer of Control, Public Interest Statement at 19 n.14 (filed Oct. 2, 1998 by Bell Atlantic and GTE) (two-sentence discussion saying merely that Bell Atlantic "hopes to have needed section 271 approvals" before the merger closes and that otherwise applicants will "request any necessary transitional relief").

6 GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control, CC Docket No. 98-184, Joint Reply of Bell Atlantic and GTE to Petitions to Deny and Comments at 15-17 (Dec. 23, 1998).

7 Letter from Steven G. Bradbury, counsel for GTE, and Michael E, Glover, counsel for Bell Atlantic, to Thomas Krattenmaker, FCC (Feb. 24, 1999). For customers of GTE's traditional voice long distance

hold the Commission's consideration of that request in abeyance.[8] More recently, Bell Atlantic and GTE have pursued several other alternatives (sometimes simultaneously), including a trust, a tracking stock, a "sale/contingent repurchase," or a partial divestiture.[9]

What these diverse proposals have in common is that they all were intended to permit certain interLATA operations of GTE to continue, post merger, in Bell Atlantic's "in-region" states.[10] They also have in common an apparent desire on the part of the merger parties not to follow the path set out in the Communications Act, which authorizes BOCs (and their affiliates) to provide interLATA services only in those in-region states for which section 271 authority has been granted.[11]

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services, the letter requested "that the FCC permit a reasonable transition period" -- presumably after the closing of the merger -- "to allow existing customers to transfer to other carriers." Id.

8 Letter from Steven G. Bradbury, counsel for GTE, and Michael E, Glover, counsel for Bell Atlantic, to Thomas Krattenmaker, FCC (Apr. 8, 1999).

9 "Bell Atlantic Offers Internet Trust To Speed Merger," USA Today, at 3B (Oct. 27, 1999); "Bell Atlantic, GTE Resume FCC Merger Talks, Lobby for Internet," Bloomberg (Oct. 27, 1999); Letter from R. Michael Senkowski, counsel for GTE, to Magalie Roman Salas, FCC (Oct. 25, 1999); Letter from Nancy J. Victory, counsel for GTE, to Magalie Roman Salas, FCC (Nov. 9, 1999) ("November 9 Ex Parte"); Letter from Steven G. Bradbury, counsel for GTE, to Magalie Roman Salas, FCC (Nov. 24, 1999) ("November 24 Ex Parte"); Letter from Patricia E. Koch, Bell Atlantic, to Magalie Romas Salas, FCC (Dec. 21, 1999) ("December 21 Ex Parte"); Letter from Steven G. Bradbury, counsel for GTE, to Magalie Roman Salas, FCC (Jan. 4, 2000).

10 These proposals have primarily focused on the interLATA activities of GTE-I, not the traditional long distance services GTE provides to residential and business customers.

11 At present, Bell Atlantic has procured such authority only for the state of New York. Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, FCC 99-404, CC Docket No. 99-295 (Dec. 22, 1999). The Commission's determination on that matter is currently undergoing appellate review.

### B. The Merger Parties' Current Proposal To Continue InterLATA Operations In Bell Atlantic In-Region States, Post Merger And Without Section 271 Approval, Is Unlawful.

Now, Bell Atlantic and GTE have presented a detailed new proposal on which the Commission has solicited public comments.[12] Specifically, the parties propose to transfer the Internet backbone and related assets of GTE-I to a new company (called "DataCo"). One hundred percent of DataCo's Class A stock would be sold to the public in an initial public offering, while 100 percent of DataCo's Class B stock would be owned by BA/GTE. The bundle of rights associated with the Class B shares would include 10 percent voting and "economic interest" in DataCo, a right of conversion into Class A shares with four times the voting and economic power of the Class A shares which had been sold to the public, the power to veto various DataCo decisions, and the establishment of various contractual obligations between BA/GTE and DataCo. BA/GTE would be free to convert its Class B shares into Class A shares at any time within five years from the closing of the merger, either because it has obtained "sufficient interLATA relief to operate the business" or so that the merged entity may "dispos[e] of its interest in DataCo."[13]

As the first-round comments of several other parties demonstrate, this proposal is not consistent with the 1996 Act. The starting point for the analysis is section 3(1) of the Communications Act, 47 U.S.C. § 153(1), which defines the term "affiliate." This definition, in conjunction with section 271, prohibits a BOC which lacks full section 271 authority from

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12 Public Notice, Commission Seeks Comment on Supplemental Filing Submitted by Bell Atlantic Corporation and GTE Corporation, CC Docket No. 98-184, DA 00-165 (rel. Jan. 31, 2000).

13 Supplemental Filing at 32-33. As to the traditional long distance services GTE currently provides in Bell Atlantic's in-region states, GTE now states that it will "unilaterally exit" that market "[b]efore the merger closes." Supplemental Filing at 30.

obtaining "indirect" as well as "direct" ownership or control of an entity that provides interLATA services in the BOC's in-region states. It also specifies that ownership includes not only equity interests of above 10 percent but also any "equivalent" interest.

Despite the Supplemental Filing's failure to provide all of the information that might be pertinent to the analysis,[14] the record is compelling on the following points:

- Substance, not form, is the decisive consideration in evaluating ownership and control.[15]
- BA/GTE would own 80 percent, not 10 percent, of the economic value of DataCo, given the certain exercise of its conversion right, which would give it four-fifths of all of the shares at no cost.[16]
- BA/GTE would exercise control of DataCo by
    - establishing "investor safeguards" that prevent Class A shareholders from making business decisions of DataCo such as whether to borrow, whether to merge,

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14 Various parties have noted the failure of the Supplemental Filing to provide certain information, including what the parties mean by the term "sufficient interLATA relief" (Nextlink Comments at 6); a plan for divesting DataCo as a stand-alone competitor (Comptel Comments at 8-9); documentation concerning the manner in which the conversion rights will be exercisable (Nextlink Comments at 8 n.25), and copies of any contracts between Bell Atlantic and GTE that will form the basis for the future relationship between DataCo and the merged entity (Comptel Comments at 9). Nor have the merger parties provided the charter and by-laws of DataCo or the prospectus for the planned initial public offering. Moreover, they have not demonstrated that (independent of the problem of lack of authority under section 271) the interLATA operations would be conducted in accordance with section 272.

15 AT&T Comments at 11-16; Comptel Comments at 3-4.

16 ALTS Comments at 6; AT&T Comments at 7, 10. It is elementary property law that ownership is a "bundle of rights." And it is crystal clear that the rights to be sold to the public constitute less -- indeed, vastly less -- than 90 percent of the equity interest in DataCo and that the rights to be retained by BA/GTE exceed 10 percent.

whether to sell assets, whether to award certain benefits to employees, or whether to issue new stock;[17]

- prohibiting any other holder or group from voting more than 10 percent of the Class A stock;[18]
- effectively controlling the officers, directors, and employees of DataCo through their past and future relationships with BA/GTE;[19] and
- leaving DataCo dependent upon BA/GTE for administrative services, loans, R&D support, intellectual property rights, and network capacity and support.[20]

Taken together, the first-round comments overwhelmingly demonstrate that DataCo would be an "affiliate." By contrast, the two organizations that support the BA/GTE proposal -- the Progress and Freedom Foundation and the Communications Workers or America -- provide no pertinent analysis of any of the foregoing matters.

### C. As A Matter Of Law, Section 271 Of The 1996 Act Requires Strict Compliance.

The central goal of the 1996 Act was to replace monopoly with competition. Congress sought to achieve that goal in part through commands and in part through incentives. The commands are found mainly in section 251(c), 47 U.S.C. § 251(c), which establish the obligations of incumbent local exchange carriers, including Bell Atlantic and GTE. The

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17 ALTS Comments at 7 n.11; AT&T Comments at 9, 23-24; Comptel Comments at 5-6; Covad Comments at 6, 7; Nextlink Comments at 10; TRA Comments at 12-14.

18 AT&T Comments at 26-27; Comptel Comments at 4-5.

19 AT&T Comments at 11, 24-26; Comptel Comments at 7.

20 Comptel Comments at 7-8; Nextlink Comments at 9-11.

incentives are in section 271, which opens new markets, new revenue streams, and new profit potential to the Bell companies. But the price of section 271 "relief" is proof that the BOCs have fulfilled their market-opening responsibilities under section 251.[21]

The logical linkage of these two provisions is obvious. Congress, however, made the linkage explicit. In an extraordinary development, Congress empowered the Commission to relieve carriers of many of the provisions of the Communications Act upon a specified showing.[22] Congress went on, however, to *foreclose* the Commission from forbearing from sections 251(c) or section 271 until they have been "fully implemented."[23] As a result, the Commission has no authority to grant exemptions from section 271.

The Commission has acknowledged this special quality of section 271. In its *Broadband Order*,[24] the Commission denied the petitions of Ameritech, SBC, US West, *and Bell Atlantic* to forbear from applying the requirements of sections 251(c) and 271 with respect to the provision of advanced services. In so doing, the Commission emphasized:

> Sections 251(c) and 271 are the *cornerstones of the framework Congress established in the 1996 Act* to open local markets to competition. The *central importance of these provisions* is reflected in the fact that they are the only two provisions Congress carved out

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21 More accurately, section 271 approval can be granted only upon a showing that the BOC satisfies either Track A or Track B, meets the 14-point competitive checklist, and complies with the structural separation requirements of section 272. 47 U.S.C. §271(d)(3). Moreover, the application can be granted only if the Commission finds that the requested authorization is consistent with the public interest, convenience, and necessity." Id. CPI has long maintained that the latter standard can be fulfilled only when a broad cross-section of consumers within the state have a "realistic choice" of local exchange carriers.

22 47 U.S.C. § 160(a).

23 47 U.S.C. § 160(d).

24 Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24,011, 24,044-48 (1998) ("*Broadband Order*") (subsequent history omitted).

> in limiting the Commission's otherwise broad forbearance authority under section 10. We find it *unreasonable to conclude that Congress would have intended that section 706 allow the Commission to eviscerate those forbearance exclusions* after having expressly singled out sections 251(c) and 271 for different treatment in section 10.[25]

The Commission also refused to permit Ameritech, US West, *and Bell Atlantic* to change their LATA boundaries, pursuant to section 3(25), in order to create a large-scale "LATA" for packet-switched services.[26] "Such far-reaching and unprecedented relief could effectively eviscerate section 271 and circumvent the pro-competitive incentives for opening the local market to competition that Congress sought to achieve in enacting section 271 of the Act."[27] The Commission concluded that requests for a global "data LATA" (or other large-scale LATAs for advanced services) were functionally no different than a request to forbear from applying section 271. The Commission declined to "exalt form over substance" and thus denied the request.[28]

The Commission should likewise refuse the current attempt of Bell Atlantic and GTE to exalt form over substance -- through a partial, temporary divestiture -- to escape the application of section 271. The merger parties have identified no statute, rule, decision, or other support for the notion that a "cornerstone of [a statutory] framework" that is of "central importance" to

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25 Id. at 24,046 (emphasis added).

26 Id. at 24,049.

27 Id. at 24,049-50.

28 Id. Despite ongoing entreaties from the Bell companies, the Commission has maintained its firm stance against deviations from the statutory regime. See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 00-26 (rel. Feb. 11, 2000).

explicit legislative goals can or should be subverted through the use of a partial, temporary divestment scheme, such as the one proposed by Bell Atlantic and GTE.[29]

The BA/GTE proposal stands in sharp contrast to the approach taken by other Bell companies that have sought approval of mergers or acquisition that raised section 271 issues. In both cases, the merger proponents promised to cure any section 271 impediments as a *precondition* of implementing their transactions.

Qwest and US West, in their pending request for consent to transfer control of US West to Qwest, have not sought to partially and temporarily divest Qwest's interLATA services in US West territory. Rather, from the outset these parties committed to the "difficult step" of completely divesting all of Qwest's interLATA services in US West territory *prior to* the merger closing.[30] Qwest and US West apparently recognized that, in order to comply with section 271 as

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29 Bell Atlantic and GTE offer numerous citations to various rules and orders, but none are pertinent to the section 271 context. In any event, the comments of AT&T (at 12-18) do an excellent job of showing that Bell Atlantic has inaccurately characterized these rules and precedents. AT&T also demonstrates (at 18-20) that the parties' recitation of MFJ precedent (Supplemental Filing at 42-46) is erroneous. On the latter subject, CPI would also observe that the parties appear to rely on the false premise that anything that might have been permitted under the MFJ is permissible under the Telecommunications Act.

To the contrary, after passage of the Telecommunications Act, the MFJ is simply inoperative. The 1996 Act provides that previously authorized activities remain permissible "to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree *if such order was entered on or before such date of enactment* . . . ." 47 U.S.C. § 271(f) (emphasis supplied). No such order authorizes Bell Atlantic to provide interLATA services throughout its in-region states, and any notions of what the District Court *might* have been persuaded to authorize are therefore entirely irrelevant.

The reason the BOCs supported passage of the Telecommunications Act of 1996, is that the 1996 Act -- unlike the Modification of Final Judgment -- specifies a clear path for any BOC to secure relief from the interLATA restriction. That clear path is to meet the conditions spelled out in section 271(d)(3).

30 See Merger of Qwest Communications International, Inc. and US West, Inc., CC Docket No. 99-272, Application for Transfer of Control, at 3, 11, 13-14 (filed Aug. 19, 1999 by Qwest and US West).

of closing, Qwest must discontinue providing interLATA services throughout US West's 14-state region.[31] Qwest's commitment to divest its interLATA services was met with favor by Chairman William Kennard, and, as a result, the Commission set the proposed merger of US West and Qwest for "fast track" consideration.[32]

The other pertinent precedent is to the same effect. Before SBC acquired Southern New England Telephone Company ("SNET"), SNET conducted interLATA activities in SBC's "in-region" states. Recognizing that these activities could not properly be continued, SNET represented that it had implemented measures to ensure that it "will not originate long distance traffic in SBC's seven-state region" after consummation of the merger, and the FCC approved the merger on condition of the "complete and continued fulfillment of these measures."[33]

The same approach followed in the Qwest and SNET cases should be followed here. Neither US West nor SBC was permitted to use a partial, temporary divestiture as a way of evading the requirements of section 271. Bell Atlantic and GTE should not be given preferential treatment.

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31 Id. at 11, 13-14.

32 "FCC Head Says US West, Qwest Merger on 'Fast Track,'" Reuters (Nov. 11, 1999). Apparently, some question has arisen about the post-merger role of Qwest/US West in the divested interLATA activities. CPI is not a party to that proceeding and takes no position on the suitability of the specific arrangements that are being proposed.

33 Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor to SBC Communications, Inc., Transferee, 13 FCC Rcd. 21292, 21309-10, 21318 (1998) ("in order to comply with section 271, SNET and its subsidiaries must cease originating long distance traffic in SBC's current seven-state region if the merger is approved").

### D. As A Matter Of Policy, Circumventing Section 271 Would Undermine Incentives To Open Local Markets.

Even if the Commission had the discretion to allow parties to circumvent section 271, it should not do so. As noted above, the prospect of section 271 "relief" is the principal incentive -- other than the threat of enforcement actions -- to obtain Bell company compliance with the market-opening obligations established in section 251(c). If Bell Atlantic can, in effect, "buy" a major interLATA business now, before it has satisfied the competitive checklist (and other requirements of section 271), its cooperation with market-opening measures will inevitably diminish.[34]

Earlier in its discussions with Commission staff, GTE implicitly conceded the danger inherent in its proposal (at that time, the proposal was a trust) by assuring the Commission that granting the requested relief "would not set a precedent for other situations" because of GTE's "unique" role as an Internet backbone service provider.[35] In the same vein, the parties now say that their proposal "will not automatically be applicable to other transactions or other contexts."[36] When a party is seeking Commission action that will establish bad precedent, it is not unusual to claim that the circumstances are so unique that the requested action will not serve as precedent. But the Commission should not be fooled. If Bell Atlantic and GTE are permitted to circumvent section 271, on what principled basis can other BOCs be denied the same privilege? If

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34 The Commission has made it clear that even narrowly tailored requests for section 271 relief will not be granted where the effect would be to weaken the incentives of the Bell company to comply with its market-opening responsibilities. Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 00-26 (rel. Feb. 11, 2000).

35 November 9 Ex Parte, Attachment at 3.

36 Supplemental Filing at 54.

interLATA operations may be initiated, maintained, and expanded before full cooperation with competitors in the local market is established, how much longer will it take before residential consumers have a competitive choice for local telephone service?

Most commenting parties agree that approval of the proposal in the Supplemental Filing would diminish the incentives of both Bell Atlantic and GTE to open their markets to competition.[37] Conversely, making it clear that market-opening cooperation must precede interLATA entry will preserve Bell Atlantic's incentive to comply with section 251(c), just as Congress intended.

## III. CONCLUSION

The Commission should reject Bell Atlantic's and GTE's proposal to circumvent section 271. This scheme would inevitably undermine the incentive mechanism Congress established and would thereby delay competition and deny consumers the full benefits of the Telecommunications Act.

The parties to the proposed merger should be informed that they have the same options available to anyone else in similar circumstances. Until they secure section 271 approval for all in-region states, by fulfilling the statutory prerequisites therefor, their alternatives are to agree to cleanly divest all in-region interLATA activities (except in states for which interLATA authority has been obtained) prior to consummating any merger, or to abandon the proposed merger. Until they decide which avenue they wish to pursue, the Commission should not allocate additional agency resources to considering this merger. Instead, the Commission could better serve the

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[37] ALTS Comments at 3-4; AT&T Comments at 31; Comptel Comments at 2; Covad Comments at 1, 3, 9; Nextlink Comments at 1-2, 12, 13.

goals of the 1996 Act by devoting its energies to ensuring that Bell Atlantic and GTE accelerate and complete their compliance with market-opening requirements. Only in this manner will consumers reap the myriad benefits of competition, as Congress intended.

Respectfully submitted,

Ronald J. Binz, President
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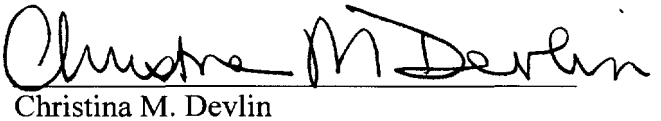
February 22, 2000

## CERTIFICATE OF SERVICE

I, Christina M. Devlin, do hereby certify that on this 22nd day of February, 2000, a copy of the foregoing Reply Comments of the Competition Policy Institute was served via electronic filing or first class mail, postage prepaid to the parties listed below.



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